No. 92-1379

In The
Supreme Court of the United States
October Term, 1992

Michigan Road Builders Association, Inc., et. al.,
Petitioners,

v.

The Director of the Michigan Department of Transportation, in his official capacity, et. al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Petitioners' Reply Brief

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March 29, 1993

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Petitioners' Reply Brief

Respondents attempt to frame Petitioners' challenge to Michigan's discriminatory minority preference program as an impermissable "collateral attack" on STURAA and the federal regulations themselves. In so doing, Respondents assume that their construction of STURAA and the federal regulations, as adopted by the lower courts, is correct. Respondents ignore the mandate of this Court that governmental affirmative action measures, whether mandated by Congress, formulated by executive agencies, or voluntarily enacted by the states, must be narrowly tailored to remedying identified prior discrimination. Respondents also overlook the fact that only Congress was given the "unique power" to enforce the equal protection guarantees of the Fourteenth Amendment; a federal agency cannot supply a legitimate justification for a state affirmative action program without specific findings of prior discrimination.

While it is true that, under Respondents' and the lower courts' construction of STURAA and the regulations, the federal affirmative action program which is used to justify Respondents' preference program would be unconstitutional as lacking the requisite narrow tailoring, Petitioners are not and need not challenge STURAA or the federal regulations in this lawsuit. This is because a contrary construction of STURAA and the federal regulations is not only available, it was intended by Congress and the Department of Transportation and, in any event, must be adopted by this Court to protect Petitioners' constitutional rights and to safeguard the constitutionality of an act of Congress.

Simply put, Petitioners are not attacking the constitutionality of either STURAA or the federal regulations; rather, Petitioners are challenging the constitutionality of Respondents' and the lower courts' **construction** of STURAA and the federal regulations. In essence, Petitioners' argument is that neither STURAA nor the federal regulations was intended or can constitutionally be construed to require the setting of unlimited state DBE goals above 10% based solely on the availability of DBE contractors, and, certainly, neither was intended or can constitutionally be construed to mandate the use of set-asides, no matter how "minimal," to guarantee attainment of goals in excess of 10%. Since the lower courts in this case have rendered opinions which are contrary to a constitutionally proper construction of an act of Congress and contrary to this Court's prior precedent, and since other lower federal courts appear to be utilizing the same erroneous reasoning, this Court should grant Petitioners' Writ to consider the important constitutional questions raised.

1. Neither STURAA Nor The Federal Regulations Were Intended To Require States To Set And Meet DBE Preference Goals Based Solely On The Availability Of DBE Contractors.

Respondents admit that they have made no findings of discrimination against minority contractors in the highway construction industry in Michigan. Respondents contend simply that they were required to adopt their program pursuant to STURAA and the federal regulations and that their program is therefore shielded in its entirety by an application of this Court's holding in *Fullilove v. Klutznick*, 448 U.S. 448 (1980). However, without even applying a *Fullilove* analysis to determine the constitutionality of Respondent's construction of STURAA and the federal regulations, the fact remains that neither STURAA nor the federal regulations authorize, let alone require, the discriminatory program adopted by Respondents.

Certainly, STURAA itself does not require the adoption of unlimited state DBE preference goals based solely on the availability of DBE contractors in the various states. As argued fully in the initial Petition, STURAA established a 10% goal for DBE preferences - period. The "not less than" language of STURAA, contrary to Respondents' argument and the lower courts' holdings, does not evidence an intent to

require states to set or meet unlimited goals with 10% as simply a floor, and no legislative history exists which even hints that Congress intended to mandate such a result.

Further, Congress must be presumed to act consistently with constitutional requirements, and the Constitution clearly forbids standardless delegations of Congress' authority and requires that race-based affirmatice action measures be narrowly tailored to remedying prior discrimination. Thus, STURAA was not intended and cannot constitutionally be construed to permit, let alone mandate, individual states to set unlimited DBE goals above 10% based on the level of DBE contractors in the state.

As to the federal regulations implementing STURAA, these too were not intended to require states to meet or set unlimited goals above 10% based solely on the availability of DBE contractors. Respondents point to 49 CFR 23.41 to 49 CFR 23.45 and argue that, as a condition of receiving funds under STURAA, these sections required them to adopt their challenged program.[1] Respondents ignore the fact that Subpart D of Part 23, 49 CFR 23.61 to 49 CFR 23.69, comprises the federal regulations specifically implementing STURAA. A close examination of the regulatory history behind Part 23, and Subpart D in particular, illustrates that the Department of Transportation (DOT) did not intend to require recipients to set and meet unlimited goals above 10% under Subpart D.

49 CFR Part 23, as originally adopted by the DOT, became effective April 31, 1980, two years before the passage of the Surface Transportation Assistance Act of 1982 (STAA; the predecessor of STURAA). Under these original regulations, recipients of various types of federal funds, including highway funds in general, were required to create a minority business enterprise (MBE) program and to submit their program to the DOT for review and approval. 49 CFR 23.41(a)(2). As

[1] Respondents' argument in this regard appears to be derived solely from a letter Respondents received from the FHWA construing the federal regulations. Respondents' Brief at 10,11. However, the FHWA's opinion does not constitute a conclusive construction of the regulations and should not preclude an independant inquiry into the Department of Transportation's intented construction thereof.

part of their state MBE programs, recipients were required to adopt a statement to the effect that their policy would be to "maximize participation" of minority business enterprises, 49 CFR 23.43(a)(1), and were further required to "take all reasonable and necessary steps" to ensure that minority businesses had the "maximum opportunity to compete for and perform contracts." 49 CFR §23.43(a)(2). Consistent with this requirement, recipients were required to establish overall and contract goals for MBE participation which were "practical and related to the potential availability of MBE's in desired areas of expertise." 49 CFR 23.45(g)(1) & (2). 49 CFR 23.45(g)(5) set forth the procedure to be used in setting overall goals pursuant to section 23.41, which procedure did require recipients to set overall goals based on the availability of minority contractors to ensure that the goals set would be "practical."

However, under this original scheme, the goals were not to be "rigid numerical quotas." 45 FR 21178 (March 31, 1980)(copy of pertinent pages reproduced in Appendix hereto at App 1a-3a). As stated in the Federal Register, "[i]f the recipient or the contractor can show that it made reasonable efforts to try to meet the goal, it will be in compliance or can be awarded a contract despite its failure to meet the numerical goals." *Id.* (App at 3a). Thus, the "goals" to be set pursuant to the DOT's MBE program requirements were very flexible, recipients were not required to justify the goals they set, nor were they absolutely required to meet them. In essence, by requiring the setting of goals, the DOT was simply attempting to require recipients to "become familiar with existing MBE's and their capabilities" and to thereby encourage "maximum possible participation." *Id.* (App at 2a).

Thereafter, Congress enacted the Surface Transportation Assistance Act of 1982 (STAA), with its 10% **DBE** expenditure requirement, and the DOT proceeded to fashion **new** regulations specifically implementing STAA. These new regulations were adopted as Subpart D of 49 CFR Part 23, which subpart was entitled "Implementation of Section 105(f) of [STAA]."

The regulatory history surrounding the DOT's rulemaking pursuant to STAA is very telling with respect to what the new regulations required vis a vis goal setting and with respect to the relationship between the DOT's existing MBE program and the new DBE program mandated by

Congress. As stated in the Preamble to the Final Rule implementing STAA:

> [49 CFR Part 23] established requirements for recipients of Department of Transportation financial assistance. The key features of this regulation, in its current form, include requirements for recipients to set overall and contract goals, award contract goals, and certify the eligibility of firms to participate in DOT-assisted contracts as MBE's.
>
> [t]he Department's implementation of section 105(f) of [STAA] builds upon this existing rule. **The new Subpart D changes the way FHWA and UMTA recipients establish overall goals.**

48 FR 33432(July 21, 1983)(emphasis added)(copy of pertinent pages reproduced in Appendix hereto at App 15a-20a); see also, DOT's Notice of Proposed Rulemaking(NPRM), 48 FR 8416 (February 28, 1983)("[t]he new subpart [D] would affect recipients of federal financial assistance from FHWA and UMTA programs funded through [STAA]. UMTA and FHWA recipients would set overall goals **as provided in the new subpart rather than as provided in the existing regulation.**")(emphasis added)(copy of pertinent pages reproduced in Appendix hereto at 4a-14a).

As "one of the key provisions of the proposed regulation," the DOT stated in its Notice of Proposed Rule Making that recipients were required to "set overall goals of not less than 10%" or to justify setting lower goals pursuant to specific regulatory procedures. 48 FR 8416 (App at 6a).[2] The version of Subpart D contained in the initial NPRM also contained a subsection which indicated that states with high minority populations were "expected" to achieve goals above the 10% level, with the Administrator having the "full discretion" to disapprove goals below

[2] This was in contrast to the goal-setting procedure under the DOT's existing MBE program which provided for flexible goals to be set based on the availability of MBE contractors, with no numerical goal requirement and no procedures for recipients to justify specific goals to the DOT. See Preamble to NPRM. 48 FR 8416 (App at 5a-6a) (distinguishing the two goal-setting procedures).

the level which the Administrator believed could be reasonably achieved by the states. 48 FR 8416 (App at 6a-7a, 10a)(discussing and setting forth the original proposed version of 49 CFR 23.64).

In response to its NPRM, the DOT received numerous comments from interested parties arguing that even a 10% DBE goal could not realistically be achieved in many states and proposing that DBE goals should be set based on the same formula used to set MBE goals. In other words, opponents argued that goals should be set based on the availability of DBE contractors in the particular jurisdictions, with no requirement that the goals be set at 10% and no requirement of justifying goals below 10%. See App at 16a-18a.

The DOT rejected the proposals to establish a DBE goal-setting procedure under Subpart D based on the availability of DBE contractors, with no requirement of justifying goals below 10%, stating that, "[t]he Department already has a an MBE program with a goal-setting mechanism similar to that endorsed by many commentors opposing **the 10% goal requirement** of the NRPM." 48 FR 33432 (App at 18a) (emphasis added). The DOT pointed out that the DBE goals were not to be as flexible as those under the MBE program, and recipients would be required to justify DBE goals below 10%.

Perhaps most significantly for present purposes, the DOT completely eliminated the section of Subpart D contained in the NPRM which required states with high minority populations to set goals above 10%. No such requirement was contained anywhere in the final regulations as adopted in 1983, and no such requirement is contained today. Indeed, the final version of Subpart D contained a section, 23.66 (not contained in the NPRM), which specifically provided that "[t]he Administrator reviews and approves **any overall goal of 10%** or more." 49 CFR 23.66(a)(emphasis added).[3] Thus, the statements contained in the NPRM regarding setting goals above 10% and discussing the Administrator's discretion to disapprove goals which were not as high as

[3] Under the existing regulatory procedure of Subpart D, the Administrator's approval of goals which are at least 10% is purely *pro forma*. See *O'Donnel v District of Columbia*, No. 89-1867, 1992 U.S. Dist. LEXIS 19723, at * 34 (D.C.D.C., December 22, 1992) (On Remand).

he found achievable were rendered a nullity by the deletion of the applicable provision in the final regulation and by the addition of section 23.66.

Although the final rule retained the requirement that goals should be **submitted** for approval pursuant to the procedures already contained in the existing 23.45(g)(5), 23.45(g)(5) clearly was not intended to provide the basis for setting the goals in the first place under the final version of Subpart D. The DBE goals were to be set exclusively pursuant to Subpart D's 10% requirement, with an established procedure for justifying goals below 10%, and were to be submitted to the DOT pursuant to the procedures contained in existing Section 23.45(g)(5) for the DOT's **pro forma** approval.

Accordingly, contrary to Respondents' argument and the lower courts' holdings, the federal regulations were not intended by the DOT to require states to set unlimited DBE goals based on the availability of DBE contractors. The regulations did require states receiving federal funds other than those under STAA (STURAA) to set **MBE goals** based on the availability of minority contractors, which goals were to be inherently flexible, but this requirement did not extend to goal-setting under Subpart D's implementation of STAA.

It must also be noted that, even if the DOT did intend to require the setting and meeting of unlimited goals above 10% based on the availability of DBE contractors, which it did not, the federal regulations by themselves cannot be used by Respondents to shield **Respondents'** discriminatory program from constitutional attack. While Congress has been found to have broad authority to enforce the Constitution's equal protection guarantees by directing states to adopt narrowly tailored affirmative action measures in situations in which the state could otherwise not do so, the same authority does not extend to the bureaucracy of the Executive Branch. The Department of Transportation is entitled to no more deference than the states with respect to affirmative action programs, and Respondents do not contend that the DOT made any findings of prior discrimination to justify requiring adoption of goals above the 10% established as necessary by Congress to remedy the discrimination Congress found.

In short, Respondents cannot rely upon the DOT's regulations to supplant the necessity of Respondents making findings of prior discrimination to justify Respondents' affirmative action program in excess of the Congressional mandate. Only Congress is empowered to make the "critical determinations" necessary to support affirmative action, and, under STURAA, Congress only provided justification for state DBE programs with 10% DBE preference goals. Congress did not and constitutionally cannot be found to have mandated an open-ended preference program providing for unlimited state DBE goals based only on the availability of DBE contractors, and neither can the DOT.

2. Neither STURAA Nor The Federal Regulations Required The Use Of Set-Asides To Meet Unlimited DBE Goals, And Respondents' Use Of Set-Asides To Meet Their DBE Goal Above 10% With No Compelling State Interest Is Constitutionally Invalid.

In addition to Respondents' setting their DBE goal well above the 10% mandated by Congress, Respondents utilized a set-aside procedure to guarantee attainment of that goal, thus, in effect, transforming their "goal" into a quota. Again, Respondents argue and the lower courts found that federal law required the use of set-asides and that Respondents were just "conscientously" following federal law by their "limited use of 1.32% set-asides" to meet their 15% DBE goal.[4]

Again, neither STURAA nor the federal regulations mandates the use of set-asides to meet DBE goals above 10%. STURAA itself clearly contains no reference to the use of set-asides to meet DBE goals which exceed 10%, and neither does Subpart D of 49 CFR Part 23. Although DOT does state in the Preamble to the rulemaking under Subart D that, "section 23.45(k) [the MBE set-aside provision] continues to apply in the

[4] Note that Respondents argue that no constitutional question worthy of review is involved because of the relatively low percentage of contracts set-aside by their program. This argument is patently without merit. Aside from the fact that 1.32% set-asides in fact equalled more than four million dollars in contract benefits from which Petitioners' were completely excluded, if Respondents' use of set-asides to meet their 15% goal is unconstitutional, Petitioners' constitutional rights have been violated, and such a wrong should not be trivialized.

context of new Subpart D," 48 FR 33432 (App at 19a), the DOT also states that:

> [s]ection 23.45(k) of the existing DOT MBE regulation permits, but does not require, recipient[s] to use set-asides on contracts as a means of meeting overall goals. Recipients may chose to use set asides if they have the authority to do so. . . . neither section 105(f)[STURAA] itself nor this regulation require the use of set-asides on any particular contract.

Id. (App at 19a-20a).

Thus, even the federal regulations upon which Respondents rely to justify their use of set-asides were not intended to negate the requirement that recipients have "authority" to use them, nor were they intended to require their use, particularly to meet DBE goals in excess of 10%. As has been stated repeatedly herein and in the Petition, no authority exists in Michigan to justify Respondents' use of set-asides to meet DBE goals above 10%.

Accordingly, Respondents' **choice** to use racially based set-asides in their DBE preference program is unsupported by any legitimate constitutional justification. While set-asides may be appropriate in instances where states have independant authority to use them, such as where states have made findings of prior discrimination, such is not the case here. This Court should grant Petitioners' Writ if for nothing else than to invalidate Respondents' use of set-asides to meet their 15% goal, no matter how "limited" Respondents' use of set-asides might be. Respondents simply have no compelling justification to use set-asides to meet DBE goals in excess of 10% as clearly required by the Constitution and this Court.

Conclusion

Under Respondents' and the lower courts' construction of STURAA and the federal regulations, Respondents' racially discriminatory preference program need not be narrowly tailored to remedying any identified prior discrimination. Congress and the DOT required DBE preference goals to be limited only by the availability of

DBE contractors in the state, and states need make no independant findings of prior discrimination to justify establishing racially based preference goals exceeding 10% or to use set-asides to assure attainment of those goals. Respondents assert that Petitioners conceded the legitimacy of this construction by conceding the constitutionality of STURAA and the federal regulations. This is simply not true.

While Petitioners do not challenge the constitutionality of STURRA or the federal regulations themselves, Petitioners do challenge the constitutionality of Respondents' **construction** of them as adopted by the lower courts. A construction which requires states to set and meet unlimited DBE goals above 10% was not and cannot constitutionally be found to have been mandated by Congress or the DOT. Even aside from the fact that such an unlimited preference program would clearly lack the narrow tailoring required by this Court to justify affirmative action and thus cannot be used to justify Respondents' discriminatory program, the language of STURAA and the history of the applicable federal regulations indicates that such a result was not in fact intended by either Congress or the DOT.

Since the construction urged by Respondents was constitutionally impermissable, and since a contrary construction was available and, indeed, intended by Congress and the DOT, the lower courts should have chosen the constitutionally permissable construction and invalidated Respondents' discriminatory preference program. The lower courts failed to do so, and this Court should grant Petitioners' Writ to determine the important constitutional questions involved.

Respectfully submitted,

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Appendix

Final Rule, Participation By Minority Business Enterprises In Department Of Transportation Programs, 45 FR 21178 (March 31, 1980) (Pertinent Pages Only) 1a

Notice of Proposed Rule Making, Participation By Minority Business Enterprises in Department of Transportation Programs, 48 FR 8416 (February 28, 1983) (Pertinent Pages Only) 4a

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Rules and Regulations

Department Of Transportation

Office of the Secretary

49 CFR Part 23

Participation by Minority Business Enterprises
in Department of Transportation Programs

Monday, March 31, 1980

Agency: Office of the Secretary, DOT
Action: Final Rule.
Summary: This final rule establishes a uniform program by which firms owned and controlled by minorities and women may participate in contracts let by recipients of financial assistance from the Department of Transportation (DOT). It supersedes all existing Minority Business Enterprise (MBE) regulations, orders, circulars and administrative requirements concerning financial assistance programs that the Department has issued. This rule requires recipients of DOT financial assistance to submit programs for increasing the participation of MBEs in their contracting activities. In particular, the regulation requires recipients to set goals for the participation of MBEs in both their overall programs and specific contracts.

* * *

Section-by-Section Analysis

The following portion of the supplemental information discusses each section of the final rule. The analysis describes differences between the final rule and the NPRM and provides the Department's response to comments relevant to each section. It does not discuss each provision of the regulation in detail.

* * *

Section 23.45--Required MBE Program Components

This section describes in detail the requirements placed upon DOT recipients and their contractors. In response to comments and in order to clarify provisions of the regulation, a number of substantive changes have been made from the NPRM.

* * *

Paragraph (g) of this section, which deals with percentage goals for work awarded to MBEs, is one of the key provisions of the regulation. It has been changed in a number of respects. Subparagraphs (1) and (2) have been clarified. In particular, the subparagraph on contract goals now clearly specifies that the recipient set goals on a specific contract. The bidder or proposer must meet or exceed the goals or demonstrate why it could not despite its best efforts.

Paragraph (g) retains the two-goal structure of the NPRM. Recipients must set overall goals for their programs and contract goals for each contract under the program. Many commenters objected to this two-goal system, favoring one overall goal. The Department, believes, however, that the two-goal approach is necessary to increase MBE participation in programs receiving DOT financial assistance. Contract-specific goals have a short-range focus requiring contractors to seek sufficient MBE participation in each contract. Overall goals require recipients to make long-term plans, requiring recipients to become familiar with existing MBEs and their capabilities. To establish these goals, the recipient must consider not only existing MBEs but also the potential availability of new MBEs and the services they could provide. By requiring recipients to set both short-term and long-term goals, the rule should increase familiarity with and use of MBEs.

Some commenters argued that setting binding goals is illegal because it is equivalent to a quota system. The goal system set forth in this rule differs significantly from an impermissible quota system. Unlike quotas, these goals are flexible. They are not rigid numerical requirements. The recipients set them based on the availability of MBEs and the type of services they perform. More importantly, a recipient or

contractor not meeting the numerical goals is not necessarily precluded from winning a contract. If the recipient or the contractor can show that it made reasonable efforts to try to meet the goals, it will be in compliance or can be awarded a contract despite its failure to meet the numerical goals. Goals of this kind are not unlawful.

* * *

Proposed Rules

Department Of Transportation

Office of the Secretary

49 CFR Part 23

Participation by Minority Business Enterprises
in Department of Transportation Programs

Monday, February 28, 1983

Agency: Department of Transportation
Action: Notice of Proposed Rulemaking.
Summary: This proposed rule would implement section 105(f) of the Surface Transportation Assistance Act of 1982, which provides that ten percent of funds authorized to be appropriated by the Act be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals. The proposed rule would add a new Subpart D to the Department's existing minority business enterprise rule, permitting recipients of financial assistance from the Department to comply with the new statutory requirement with a minimum of disruption to existing administrative practice.

* * *

Relationship to Existing Minority Business Enterprise Rule

The Department's minority business enterprise (MBE) rule (49 CFR Part 23) continues fully in effect. Promulgation of a final rule based on this NPRM (which would result in a new Subpart D of 49 CFR Part 23) would have no effect on recipients of Federal financial assistance from the Federal Aviation Administration, the National Highway Traffic Safety Administration and the Federal Railroad Administration. These recipients would continue to implement 49 CFR Part 23 without change.

The new subpart would affect recipients of Federal financial assistance from FHWA and UMTA programs funded through the Surface Transportation Assistance Act of 1982. UMTA and FHWA recipients would set overall goals as provided in the new subpart rather than as provided in the existing MBE regulation. However, this change and the associated amendments contained in this NPRM (relating to such matters as definitions, waivers, and compliance) would be the only changes FHWA and UMTA recipients would make in implementing their MBE programs.

In all other respects, FHWA and UMTA recipients would continue to implement the existing 49 CFR Part 23. For example, recipients would continue to operate their programs and goals for businesses owned and controlled by women without change. Recipients would continue to award individual contracts in the same way as now provided by 49 CFR Part 23, requiring the apparent successful competitor for a contract to make good faith efforts to meet contract goals. Recipients would also continue to examine and certify the eligibility of MBE's as they do now.

The major change made by this subpart would concern overall goals. Under the existing regulation, overall goals are simply an administrative mechanism designed to help recipients meet their obligation to ensure that MBEs have an equal opportunity to compete for and perform DOT-assisted contracts. The present overall goals are established by recipients as a benchmark against which they can measure the performance of their MBE programs. The goals represent a level of MBE participation which it is reasonable to expect, given fully equal opportunities for MBEs. Failure to meet an overall goal is not regarded as noncompliance with the regulation. Rather, it is an indication that administrative changes or improvements in a recipient's MBE program may be necessary.

Under the proposed rule, the Department sets recipients' overall goals at a minimum of ten percent, unless a waiver is granted in accordance with paragraph 23.65. Failure by a recipient to meet its overall goal is regarded as noncompliance with the regulation. The overall goals proposed by this NPRM, unlike the overall goals of the existing rule, go beyond seeking to ensure equal opportunities for MBEs. Rather, the overall goals of the proposed subpart implement the commitment of section 105(f) to an affirmative action policy designed to

overcome the effects of past discrimination and disadvantage. As proper for a policy of this kind, it is limited in duration.

* * *

Section 23.64 Overall Goals

Subsection (a) of this section is the key provision of Subpart D. Paragraph (a)(1) requires recipients of funds to which this subpart applies to set overall goals of not less than ten percent of the aggregate dollar amount of all Federal-aid highway and transit funds, respectively, to be expended in contracts during the forthcoming fiscal year. This means that recipients which receive funds from both UMTA and FHWA would have to set separate goals for their highway and transit programs. The Department solicits comment on ways to minimize administrative inconvenience that could result from such recipients (e.g., state DOTs) having to submit more than one goal to DOT. The requirements of this paragraph may be waived only through the procedures of § 23.65.
The reference to § 23.41 is intended to prevent the imposition of new administrative burdens on recipients who are not required to have an MBE program under the existing regulation (§ 23.41 would be amended to include all UMTA programs funded by the Act). The reference would ensure that a recipient which is not required to have an MBE program under § 23.41 (e.g., an UMTA recipient which receives less than $250,000 in UMTA assistance) would not have to create a program in order to comply with Subpart D. Recipients which are not required to have an MBE program would not have to submit overall goals to the Department under this subpart.

With respect to goals for UMTA transit programs, paragraph (a)(2) would give the UMTA Administrator discretion to permit an UMTA recipient to set an overall goal applicable to a particular grant, project, or group of grants or projects, even if the grants or projects involved are not confined to a given fiscal year. This approach may make more sense than an annual goal in some circumstances.

The Department strongly encourages recipients to exceed ten percent participation whenever it is possible to do so. Subsection (b) points out that, in areas with relatively high minority populations, such as large cities and highly urbanized areas, it is expected that recipients

will spend substantially more than ten percent of covered funds with MBEs. The Department will evaluate recipients' performance in this regard when considering the approval of goals and waiver requests.

Subsection (c) emphasizes that goals under this section are submitted to the FHWA or UMTA Administrator, as applicable, in the same manner and at the same time as overall goals are submitted under § 23.45(g)(3) for the remainder of recipients' programs under Subpart C of 49 CFR Part 23. In order for the recipient to be in compliance with Subpart D, the Administrator must approve the overall goal submitted under this section.

The Administrator retains full discretion with respect to the approval of overall goals. Even if the recipient has requested approval of an annual overall goal of ten percent or more, the Administrator need not approve it if he or she determines that the recipient can achieve a higher level of MBE participation during the fiscal year. For example, if a certain recipient has had a 15 percent overall goal in recent years and has met or come close to meeting that goal, the Administrator is free to disapprove a requested 11 percent goal and require the recipient's goal to be 15 percent. Under subsection (a), ten percent is a floor for recipient's overall goals, not a ceiling above which recipients may not be required to rise if doing so is reasonably achievable.

The statutory ten percent goal affects funds authorized by the Surface Transportation Assistance Act of 1982 for fiscal year 1983, which has already begun. Obviously, submission of overall goals under this section and requests for waivers under § 23.65 before the beginning of the fiscal year is not possible for this fiscal year. FHWA and UMTA will provide administrative guidance to recipients in the near future concerning the handling of these matters for fiscal year 1983.

Subsection (d) points out that work performed by firms owned and controlled by women, who are not also socially and economically disadvantaged individuals, cannot count toward goals under this subpart. This is because (aside from the few women who have received 8(a) certification from SBA) non-minority women are not defined as socially and economically disadvantaged individuals by section 8(d) of the Small Business Act and its implementing regulations. At the same time, recipients are required to continue to set separate goals for firms owned

and controlled by women under Subpart C of 49 CFR Part 23. Subpart D does not change recipients' programs for such firms at all.

* * *

Secretary of Transportation

1. For the reasons set forth in the preamble, the Department of Transportation proposes to amend Part 23 of Title 49, Code of Federal Regulations, by adding thereto a new Subpart D, to read as follows:

PART 23 -- [AMENDED]

* * * * * *

Subpart D--Special Provisions for Recipients of Funds Under the Surface Transportation Assistance Act of 1982

23.61 Purpose
23.62 Applicability.
23.63 Definitions.
23.64 Overall Goals.
23.65 Waivers.
23.66 Compliance.

Authority: Section 105(f) of the Surface Transportation Assistance Act of 1982 (Pub. L. 97-424).

§ 23.61 Purpose.

The purpose of this subpart is to implement section 105(f) of the Surface Transportation Assistance Act of 1982 (Pub. L. 97-424), concerning small business concerns owned and controlled by socially and economically disadvantaged individuals.

§ 23.62 Applicability.

This subpart applies to all Federal-aid highway funds authorized to be appropriated by Title I and section 202 of Title II of the Act, and to all urban mass transportation funds authorized to be appropriated by Titles I and III of the Act or by the Urban Mass Transportation Act of 1964, as amended, apportioned or allocated to recipients, which participate in DOT-assisted prime contracts or subcontracts.

§ 23.63 Definitions.

The following definitions apply to this subpart. Where these definitions are inconsistent with the definitions of § 23.5 of this part, these definitions control for purposes of Subpart D. The definitions of § 23.5 control for all other purposes under this part.

"Act" means the Surface Transportation Assistance Act of 1982 (Pub. L. 97-424).

"Minority"--See definition of "socially and economically disadvantaged individuals."

"Minority business enterprise" or "MBE" means a small business concern (1) which is at least 51 percent owned by one or more socially and economically disadvantaged individuals, or, in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more socially and economically disadvantaged individuals; and, (2) whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

"Small business concern" means a small business as defined pursuant to section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto.

"Socially and economically disadvantaged individuals" means those individuals who are citizens of the United States and who are Black Americans, Hispanic Americans, Native Americans, or Asian-Pacific Americans and any other minorities or individuals found to be disadvantaged by the Small Business Administration pursuant to section

8(a) of the Small Business Act. For convenience, these individuals and groups are referred to as "minorities" in this subpart. Recipients may make a rebuttable presumption that individuals in the following groups are socially and economically disadvantaged (the certification appeals mechanism of § 23.55 of this Part shall be available with respect to individuals alleged not to be socially and economically disadvantaged):

(1) "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;

(2) "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race;

(3) "Native Americans," which includes persons who are American Indians, Eskimos, Aluets, or Native Hawaiians; and

(4) "Asian-Pacific Americans" which includes persons whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, India, Pakistan, Bangladesh, the Philippines, Samoa, Guam, the U.S. Trust Territories of the Pacific, and the Northern Marianas.

§ 23.64 Overall goals.

(1) Each recipient of Federal-aid highway funds or urban mass transportation funds to which this subpart applies, that is required to establish an MBE program under § 23.41 of this part, shall set an annual overall goal of not less than ten percent of the dollar value of such funds to be used in DOT-assisted prime contracts and subcontracts during each fiscal year, unless the FHWA or UMTA Administrator has specifically granted a waiver under § 23.65 of this subpart.

(2) In appropriate cases, the UMTA Administrator may permit UMTA recipients to express this goal as a percentage of the funds for a particular grant, project, or group of grants or projects.

(2)(b) It is expected that recipients will spend substantially more than ten percent of covered funds with MBEs in areas of relatively high minority concentration, such as large cities and highly urbanized areas.

(2)(c) Each recipient shall submit the goals required by subsection (a) of this section to the concerned Departmental element for approval as provided in § 23.45(g)(3) of this part.8

(2)(d) Work performed by firms owned and controlled by women who are not socially and economically disadvantaged individuals shall not be counted toward goals under this subpart. Recipients shall continue to implement programs and goals for businesses owned and controlled by women as provided in Subpart C of this part.

§ 23.65 Waivers.

(1) Any recipient may request the Administrator of the concerned Departmental element to grant a waiver of the ten percent annual overall goal required by § 23.64(a) of this part.

(2) A separate waiver request shall be made for each fiscal year for which the recipient seeks a waiver.

(3) Each waiver request shall be accompanied by sufficient information to permit the Administrator to determine whether a waiver is justified, in accordance with the waiver criteria of subsection (b) of this section.

(4) The recipient shall make its waiver request before the beginning of the fiscal year to which it applies, no later than the time it submits its request for approval of its annual overall goal for that fiscal year.

(3) Recipients shall submit waiver request to the Administrator of the concerned Departmental element through the cognizant FHWA Division and Regional Offices or the UMTA Regional Office, as applicable. The FHWA Division and Regional Offices or the UMTA Regional Office forward the request to the Administrator, attaching their recommendation concerning whether the request should be granted, denied, or modified.

(3)(b) The Administrator of the concerned Departmental element shall evaluate requests for waivers according to the following criteria:

(3)(b)(1) Efforts to locate and utilize MBEs. This includes soliciting the aid of the Minority Business Development Adminstration, the Small Business Administration, the Department of Transportation's Office of

Small and Disadvantaged Business Utilization and other sources for locating MBEs. This also includes the recipient's efforts, through advertisements, publications, or other communications, to make MBEs aware of contracting opportunities. In connection with this criterion, the concerned Departmental element also reviews the growth of the recipient's annual overall MBE goals and accomplishments in the recent past.

(3)(b)(2) Initiatives to encourage and develop MBEs. The concerned Departmental element will consider all documented efforts made by the recipient to assist the formation and growth of MBE firms. This includes technical assistance and support services provided to MBEs and solicitation of available sources for assisting MBEs. For recipients of Federal-aid highway funds, this also includes soliciting the aid of the FHWA Supportive Services Program.

(3)(b)(3) The number of MBEs available for work on contracts covered by this subpart. An MBE directory or list of MBEs certified by the recipient shall be available for review. In no case shall the number of MBEs deemed available for work on the recipient's contracts be limited by state or local residency requirements or other formal or informal restrictions on the area from which MBEs are selected. In evaluating the availability of MBEs under this paragraph, the Administrator of the concerned Departmental element takes into account unusual circumstances, such as the expenditure of a significant portion of the recipient's funds in a single fiscal year on a large project requiring specialized expertise which available MBEs do not have.

(3)(b)(4) Efforts made by the state to remove legal or other barriers to the participation of MBEs in the recipient's contracts at a level sufficient to meet the recipient's annual overall goal. This includes such actions as lowering or waiving bonding requirements for MBEs, setting aside contracts for MBEs, assisting MBEs in the acquisition of capital and other resources necessary to effective participation, and eliminating or waiving licensing or prequalification requirements for MBEs. Difficulties caused by state or local law are not grounds for a waiver.

(3)(b)(5) The size of the minority population. This factor is of limited significance by itself, and wili be used in conjunction with other criteria.

(3)(b)(5)(1) The Administrator of the concerned Departmental element approves a waiver request only if he or she determines that the recipient has demonstrated that it is making all feasible efforts to meet its annual overall goals but will be unable to do so because there are not sufficient eligible and qualified MBEs.

(3)(b)(5)(2) Before acting on a waiver request, the Administrator provides the director of the Office of Small and Disadvantaged Business Utilization with an opportunity to review and comment on the waiver request.

(3)(b)(5)(3) If the Administrator grants the waiver, he or she establishes an adjusted annual overall goal that the recipient is required to meet for the fiscal year in question. The Administrator may condition the grant of a waiver on any reasonable future action by the recipient.

§ 23.66 Compliance.

(a) Compliance with the requirements of this subpart is enforced through the provisions of this section, not through the provisions of Subpart E of this part.

(b) Failure of a recipient to have approved annual overall goals, as required by § 23.64(a) of this subpart, or to have an approved MBE program, is noncompliance with this subpart.

(c) If a recipient fails to meet an approved annual overall goal in any fiscal year, it shall demonstrate to the Administrator of the concerned Departmental element why the goal should not be achieved and why meeting the goal was beyond the recipient's power to control.

(d) If the Administrator determines that the recipient's failure to meet an annual overall goal is not supported or adequately justified, the Administrator shall direct the recipient to take appropriate remedial action. Failure to take the remedial action directed by the Administrator is noncompliance with this subpart.

(d)(1) In the event of noncompliance with this subpart by a recipient of Federal-aid highway funds, the FHWA Administrator may take any action provided for in 23 CFR 1.36.

(d)(2) In the event of noncompliance with this subpart by a recipient of funds administered by UMTA, the UMTA Administrator may take appropriate enforcement action. Such action may include, pursuant to grant agreements, the suspension or termination of Federal funds or the refusal to approve projects, grants, or contracts until deficiencies are remedied.

§ 23.41 [AMENDED]

2. The Department also proposes to amend § 23.41(a) of Title 49 of the Code of Federal Regulations as follows:

a. By amending § 23.41(a)(2)(i) thereof to read as follows:

(i) Applicants for funds in excess of $250,000, exclusive of transit vehicle purchases, under sections 3, 5, 9, 9A, 17 and 18 of the Urban Mass Transportation Act of 1964, as amended, and Federal-aid urban systems;

b. By amending § 23.41(a)(3)(ii) thereof to read as follows:

(ii) Applicants for funds in excess of $500,000, exclusive of transit vehicle purposes, under sections 3, 5, 9, 9A, 17 and 18 of the Urban Mass Transportation Act of 1964, as amended, and Federal-aid urban systems;

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Rules And Regulations

Department Of Transportation

Office Of The Secretary

49 CFR Part 23

Participation by Minority Business Enterprises in Department of Transportation Programs

Thursday, July 21, 1983

Agency: Department of Transportation
Action: Final rule; request for comments.
Summary: This regulation implements section 105(f) of the Surface Transportation Assistance Act of 1982, which provides that, except to the extent that the Secretary determines otherwise, not less than ten percent of the amounts authorized to be appropriated under the Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals. The regulation adds a new Subpart D to the Department's existing minority business enterprise regulation. The Department also requests comments on § 23.67 of the final rule.

* * *

Background

The Existing Regulation

On March 31, 1980, the Department of Transportation published a regulation on "Participation by Minority Business Enterprise in Department of Transportation Programs" (45 FR 21172). This regulation, codified as 49 CFR Part 23, established requirements for recipients of Department of Transportation financial assistance. The key features of this regulation, in its current form, include requirements for recipients to set overall and contract goals, award contracts goals, and

certify the eligibility of firms to participate in DOT-assisted contracts as MBEs.

The Department's implementation of section 105(f) of the Surface Transportation Assistance Act of 1982 (STAA) builds upon this existing rule. The new Subpart D changes the way FHWA and UMTA recipients establish overall goals and also makes some changes concerning the eligibility of firms to participate in the program. Otherwise, the Department's program continues to operate in the same way as it is under the existing regulation.

* * *

Goals

Minority Contractor Comments

As one of the key provisions of the proposed regulation, the requirement of the NPRM that recipients have a ten percent overall goal, unless the Department granted a lower goal through the waiver process, generated a substantial amount of comment. Comments from minority contractors, their supporters in Congress, some local governments, and other organizations stressed that it was important for the Department to insist on recipients meeting ten percent goals. Doing so is necessary to comply with the statute, in their view. Moreover, they asserted that minority contractors were available in sufficient numbers to enable recipients to meet ten percent goals, if recipients and prime contractors were serious about using them. These commenters emphasized the need for recipients to make substantial efforts to assist minority businesses, such as technical assistance, relief from burdensome bonding requirements, and outreach to locate minority businesses.

Comments from Nonminority Contractors and Recipients

Most state transportation agencies (as well as a few transit authorities) and nonminority contractors who commented took a very different view of the availability of minority businesses. These commenters said that there were no sufficient MBE contractors available to permit some jurisdictions to meet a ten percent goal. Many of the state transportation agencies asserting that they could not meet a ten

percent goal were from small, relatively rural states with small minority populations. Some of these commenters cited specific information as to the numbers of minority businesses which they believed were available to work on their projects, saying that these small numbers and their remoteness from population centers with higher numbers of minority businesses made achieving higher goals very difficult.

These commenters also asserted that increases in goals to comply with section 105(f) would mean that virtually all MBE contractors would be fully employed in their own jurisdictions, and consequently unavailable to work elsewhere. These commenters also cited other reasons, like existing minority businesses having failed because of recent economic conditions and the concentration of minority businesses in certain specialty fields, as limitations on MBE availability.

In making a point that ten percent goals would be difficult to achieve, some commenters made the point that they would have to be sharp increases in MBE participation in many jurisdictions. For example, one nonminority contractor said that Illinois would have to increase its MBE participation over 500 percent in the four year period from 1982 to 1986 to make a ten percent goal. A general contractors' association cited sharp percentage increases that would be necessary in various states. Since many states and nonminority contractors believed that these jurisdictions are already straining to meet existing MBE goals, these large increases struck them as impossible to make.

As an alternative to a requirement that each recipient, absent a waiver, establish a ten percent overall goal, the nonminority contractors and recipients who believed that they could not make the ten percent goal offered an alternative. Essentially, the alternative was to continue the procedures of the existing regulation with respect to overall goals. That is, each state would submit a goal based on its own understanding of the MBE participation it was able to achieve. This overall goal would not be required to be ten percent or any other figure. FHWA or UMTA would have the same authority they have now to review and approve overall goals. If the recipient's goal was less than ten percent, the recipient would not have to make any special showing in order to justify the goal.

The alternative is explicitly premised on a view of the statute as setting a nationwide target for MBE participation that was not intended to result in the imposition of specific goal requirements on any particular recipient. This approach, the commenters contend, is the appropriate way for the Secretary to utilize what the commenters characterized as the "broad discretionary waiver authority" given her by the statute.

The Department's Response to the Comments

The Department already has an MBE program with a goal-setting mechanism similar to that endorsed by many commenters opposing the ten-percent goal requirement of the NPRM. It has made progress in improving MBE participation in DOT financial assisted program. However, with respect to the largest of these programs, the Federal-highway program, the level of minority business participation has remained well below ten percent. In section 105(f), Congress conveyed a clear message that it wanted disadvantaged participation to increase to ten percent. The Department has an obligation to comply with this statutory requirement.

The Department can succeed at meeting its obligation to ensure that ten percent of funds in the FHWA and UMTA programs are expended with disadvantaged businesses only to the extent that the Department's individual recipients set and meet goals at at least a ten percent level. If individual recipients do not set and meet goals of at least ten percent, it would be very difficult for the Department to argue that it was conscientiously attempting to carry out its responsibility under the statute to achieve an aggregate of a ten percent level of participation.

In section 105(f), Congress said that DOT shall expend not less than ten percent of funds authorized by the Act with disadvantaged businesses. By adding the phrase "Except to the extent that the Secretary determines otherwise * * *," Congress clearly provided an exception to this mandate. The Department believes, however, that to construe the statute to require nothing more with respect to setting goals than the provisions of the Department's existing regulation would result in the exception swallowing the rule. Had Congress desired the continued implementation of the Department's existing rule without change, Congress would not have passed section 105(f). The Department cannot nullify the intent of Congress by interpreting a statute calling for change in the Department's

performance to require no change. For these reasons a basic premise of the final regulation is that the ten percent participation requirement of section 105(f) will be met only if recipients set and meet goals of at least ten percent. This is why recipients for goals of less than ten percent must be supported by adequate justification.

The second major point made by commenters opposed to the NPRM's requirement for ten percent goals was that many recipients could not meet ten percent goals. If this is the case (and minority contractors who commented did not agree that it is), then, under the Department's final rule, recipients will have the opportunity to justify a goal lower than ten percent. The Department has no objection to approving a goal lower than ten percent for a recipient that is able to demonstrate that the reasonable expectation for disadvantaged business participation in its DOT-assisted program is less than ten percent. Approving lower goals in this fashion is a proper use of the exception authority granted of the Secretary by the introductory phrase of the statute. The existence of this mechanism for approving goals lower than ten percent should adequately handle the situation of those recipients who genuinely could not be expected to meet a ten percent goal.

* * *

Set-Asides, Quotas and Goals

For purposes of clarity, the Department believes that it is important to distinguish carefully among three terms often used in the discussion of programs to encourage the use of minority businesses. The first, of these terms is "set-aside." As used in 49 CFR Part 23, "set-aside" has a very narrow and distinct meaning. It refers to an arrangement in which a particular contract is reserved for competition solely among minority businesses. If a recipient's solicitation for bids on a given contract provides that only disadvantaged businesses may bid on the contract, and no one else need apply, the contract is a "set-aside."

Section 23.45(k) of the existing DOT MBE regulation permits, but does not require, recipient to use "set-asides" on contracts as a means of meeting overall goals. Recipients may choose to use "set-asides" if they have the authority to do so. Section 23.45(k) continues to apply in the context of the new Subpart D. However, despite the frequent reference

in comments to section 105(f) as a "set-aside" program, neither section 105(f) itself nor this regulation require the use of "set-asides" on any particular contract.

The second term is "quota." A "quota" is a flat numerical requirement that a recipient or contractor is required to meet in order to obtain a benefit. For example, if a recipient, in its solicitation for bids, provides that contracts must have ten percent MBE subcontracting participation to get the contract, regardless of circumstances or the good faith efforts that the contractor might make, the recipient has imposed a "quota." Likewise, if the Department told a recipient that must achieve a ten percent level of disadvantaged business participation or forfeit eligibility for Federal financial assistance, the Department would be imposing a "quota."

The key feature of a "quota" is that it is a simple numerical requirement that a recipient or contractor must meet, without consideration of any other factors. The recipient or contractor either makes the number or loses the benefit. Some commenters, principally nonminority contractors, used the term "quota" rhetorically to refer to the use of goals in the existing 49 CFR Part 23 or new Subpart D. This is an incorrect understanding of the term. Under the existing DOT regulation and the new Subpart D, the Department of Transportation does not operate a "quota" system. Neither the proposed nor final Subpart D could impose penalties or sanctions on recipients simply because they fail to meet an overall goal.

The third term is "goal." A "goal" is a numerically expressed objective which recipients or contractors are required to make efforts to achieve. The key requirement is to make efforts. Results are, of course, important, but compliance does not turn simply on quantifiable results. In the case of the overall goals established by Subpart D, this means that a recipient is not in noncompliance with the regulation simply because it fails to meet an overall goal. Rather, if the recipient is unable to meet the goal, it must explain its inability to do so and, if directed by the Administrator, take remedial steps.

* * *